Supreme Court, U.S.
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No. 92-1396

In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

OBJECTIONS TO JURISDICTION

1. On June 16, 1992, the Appellate Division of the Superior

Court of New Jersey decided *Frank A. Greek & Sons, Inc. v. The Township of South Brunswick*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div.), certif. denied *sub nom Morris Industrial Builders, Inc. v. The Township of South Brunswick*, 130 N.J. 602, 617 A.2d 1224 (1992). Therein the Appellate Division reversed the trial court and remanded the matter for further proceedings at the trial level, with an instruction that the nature of such proceedings would necessarily depend upon the outcome of the appeals challenging the regulations passed by the Council on Affordable Housing ("COAH") then pending in the Appellate Division.[1] The New Jersey Supreme Court's denial of Petitioner's petition for certification effectively ratified the Appellate Division's remand. Thus, Petitioner's case is still pending at the trial level and will remain so until the question of the COAH regulations is resolved. That being the status of Petitioner's case, it is not ripe for consideration by this Court.

2. Procedurally it appears that Petitioner's submission does not fall into any of the categories set forth in U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (West Supp. 1992). Even if such categories are not all-

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1. Uncertainty as to the length of time it would take COAH to adopt rules and regulations was a factor in the trial court's decision. Ironically, COAH promulgated the rules and regulations within the time estimated by counsel for COAH during oral argument before the trial judge on the motion for summary judgment (*See* Petition, pp. 16-20; Petitioner's Appendix C, pp. 20a-25a). The rules and regulations were adopted in December, 1991, and effective in January, 1992. Petitioner implied, in its Statement of the Case, that the new COAH regulations automatically allow municipalities to retain the fees collected before December 13, 1990. Such is not the case. A municipality must apply to COAH for review of its previous development fee ordinance and a determination as to whether or not the municipality may retain some or all of the fees collected thereunder (N.J.A.C. 5:91-15.1, *et seq.*). December 13, 1990 is the date the New Jersey Supreme Court decided *Holmdel Builders Association v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990), which directed COAH to promulgate rules and regulations and is also the underlying decision upon which Petitioner relied to prosecute its claim for a refund of the fees paid.

inclusive, as indicated in the Rule, it must also be noted that Petitioner failed to raise any Fifth or Fourteenth Amendment claims in the courts below until the petition for certification to the New Jersey Supreme Court. At that point, Petitioner claimed that the Appellate Division failed to consider the developers' Fifth Amendment due process right to a "clear and certain remedy" for alleged improperly collected development fees. In that petition, as in this, Petitioner relied primarily on *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990), to support its claims. The petition was denied by the New Jersey Supreme Court. Petitioner should not be permitted to raise here what it failed to raise below.

3. Petitioner also raised a question of the New Jersey appellate court's "mistaken application of the choice-of-law factors of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)." Respondents recognize that Petitioner has, at this stage, merely submitted the petition for a writ of certiorari and that a brief on the merits will follow if the petition is granted. However, aside from a brief reference to the *Chevron* case and a citation of the case which applies it to New Jersey cases, Petitioner completely failed to provide this Court with any guidance as to how it believes the Appellate Division mistakenly applied the law or how this "mistake" relates to Fifth and Fourteenth Amendment claims.

4. Finally, the entire affordable housing issue in the State of New Jersey, from the original decision in *Southern Burlington County NAACP v. Mt. Laurel Township*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975), through the decision under consideration here, has always been a matter of state constitutional law. The New Jersey Supreme Court found that municipalities have an obligation under the New Jersey State Constitution to provide a realistic opportunity for affordable housing. The decisions regarding the mandate to provide such housing, methods of implementation, codification through the Fair Housing Act

("FHA"),[2] and the appropriateness of development fees as a part of the solution to the pressing need for affordable housing in New Jersey, have all been determined on state constitutional grounds. The State courts are the appropriate interpreters of the State Constitution and, therefore, this matter should not be before this Court. Where certiorari has been sought in past affordable housing decisions, this Court has denied the writ; so, too, is denial appropriate in this case.

STATEMENT OF THE CASE

To avoid repetition of Petitioner's presentation, Respondents merely offer the following additions to the Statement of the Case as set forth in the petition at p. 3, *et seq.*

1. Before Respondent Township of South Brunswick adopted its affordable housing trust fund (development fees) ordinance in 1986, it had submitted to and received the approval of COAH for the housing plan element of its zoning ordinance. This submission was in accordance with the rules and regulations promulgated by COAH pursuant to the FHA. That housing plan element identified certain tracts of undeveloped land within the Township of South Brunswick which would be suitable for inclusionary developments (*i.e.* those which manditorily included affordable housing units) and yet fit into the master plan for the Township. The zoning ordinance provided that developers of those tracts could be given certain compensations, such as density bonuses, for including a specific percentage of low to moderate income housing within the development. It was not until after the entire plan was in place that the Township determined that the plan, while imposing substantial burdens on those developers who chose to develop the inclusionary parcels, still would not be sufficient to meet the Township's future needs for affordable housing as set by COAH from time to time.

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2. N.J.S.A. 52:27D-301, *et seq.*

It was only then that the Township looked to those other developers who benefited from the utilization of the Township's most finite resource — land — *i.e.* the developers of non-inclusionary residential tracts and commercial/industrial tracts, for their contribution to the municipality's housing obligation. The FHA specifically provides that municipalities do not have to expend municipal revenues to provide affordable housing, N.J.S.A. 52:27D-311d. In *Holmdel Builders Association, supra*, 121 N.J. at 573-74, the New Jersey Supreme Court interpreted this provision of the FHA to mean that the Legislature had determined that affordable housing does not have to be provided directly by local governments and that local governments are, therefore, impliedly authorized to use inclusionary-zoning devices such as mandatory development fees to generate affordable housing. The Court found that development fees applied to non-inclusionary developers are the functional equivalent of the mandatory set-asides imposed on inclusionary developers. *Id.* at 576. Contrary to Petitioner's implication, the Township is not relying solely upon funds generated by development fees to meet the affordable housing mandate imposed upon it by the New Jersey Constitution; indeed, a substantial portion of that obligation is being met by those developers who are actually including affordable housing units in their residential developments.

2. Petitioner claimed, in n.1 of the petition, that the only procedure for challenging the development fees was "expensive and protracted" litigation. In the paragraph following the footnote reference, Petitioner described that very litigation, which was undertaken by several builders' associations. Petitioner was a direct beneficiary of that litigation (without having borne the expense of it) in that the New Jersey Supreme Court, in *Holmdel Builders Association, supra,* indicated that individual developers could seek refunds of the fees previously paid.

Petitioner also claimed that the Court did not address the

taking and due process issues raised by the builders' associations. In *Holmdel Builders Association, supra*, 121 N.J. at 558, the Court defined the issues it would address:

> This appeal raises two major substantive issues. One is whether there is statutory authority, derived from the FHA, the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -129, and the general police power of government, N.J.S.A. 40:48-2, that enables a municipality to impose affordable-housing development fees as a condition for development approval. That issue raises the related questions whether the development-fee ordinances constitute an impermissible taking of property or violate substantive due process or equal protection. The second major issue is whether affordable-housing development fees are an unconstitutional form of taxation. Finally, if these ordinances are invalid, the appeal presents the issue whether a trade organization has standing to seek a refund on behalf of its members.

After determining that the imposition of development fees was permitted by the FHA, MLUL and general police powers, the Court did examine the related constitutional claims. The Court determined that because the plaintiffs therein did not allege that they were members of a suspect class, the alleged violations of due process and equal protection could be resolved by reference to the validity of the development fees as reasonable exercises of statutory zoning and police powers. *Id.* at 581. The Court also stated that, "As long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury." *Id.* at 582.

Finally, the Court determined that the fees were a form of inclusionary zoning and similar to other land-use and related exactions and thus were regulatory measures, not taxes. *Id.* at 585.

REASONS FOR DENYING THE WRIT

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). *See also, Ferguson v. Skrupka*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). However, retroactive legislation does have to meet a burden not faced by legislation that has only future effects. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 16-17, 96 S. Ct. at 2892-2893. But that burden can be met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose. *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718, 81 L. Ed. 2d 601 (1984).

Under New Jersey case law the burden which a party must bear to show that a legislative action violates due process or equal protection is substantial. He must show that there is no reasonable basis for the action, it serves no legitimate legislative purpose and cannot be justified under any conceivable state of facts. *Drop v. Belleville*, 192 N.J. Super. 236, 469 A.2d 934 (App. Div. 1983). Alternatively, to defend an enactment, the legislative body need only show that the distinctions drawn further an appropriate government interest and are not arbitrary. *Shepard v. Woodland*

Township Committee and Planning Board, 71 N.J. 230, 364 A.2d 1005 (1976).

The government interest here is obvious, provision of low income housing pursuant to the municipality's obligation under the New Jersey State Constitution to do so. The basis for imposing the development fee only on new non-inclusionary development is equally clear. The *Mount Laurel* decisions[3] require municipalities to regulate land development in such a way as to ensure that lower income housing needs are met. The New Jersey Supreme Court has held that municipalities are constitutionally obligated to exercise their zoning powers in such a way that new development will include a regional fair share of affordable housing. Developers of inclusionary sites are mandated by the Township's zoning ordinance to do their share. The development fee ordinance allows the municipality to obtain funds from non-inclusionary developers to offset, in part, the increased need for affordable housing created by such development, an increased need which is part of the total affordable housing need in the Township. Moreover, whether development fees are utilized to satisfy an indigenous housing need or the need created by the new development, a development fee ordinance bears a real and substantial relationship to a legitimate government interest and imposes the fee on a fair and rational basis.

The New Jersey Supreme Court, in *Holmdel Builders Association, supra*, at 579-80, deferred to COAH to specify, through its rulemaking procedures, standards for development fees, "so that municipalities may consider employing such fees as inclusionary-zoning devices in designing their housing elements under the FHA. Regulatory standards will enable us to determine

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3. *Southern Burlington County NAACP v. Mt. Laurel Township, supra, (Mt. Laurel I)*, and *Southern Burlington County NAACP v. Mt. Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*).

that persons subject to such ordinances have been reasonably informed of their obligations, and that both municipalities and COAH in the adoption and approval of such ordinances are acting in conformity with the legislative intent of the FHA." After describing some of the areas which it expected COAH to include in the regulations, the Court said, at 580:

> COAH, in the exercise of sound administrative discretion, should consider the desireability and feasibility of such development fees in the broader context of the State's affordable housing policy. Development fees can be a valuable alternative that some municipalities desire to employ in fulfilling their *Mt. Laurel* obligations. Moreover, such fees should be considered constituent parts of local housing elements designed to meet municipal affordable-housing obligations under the FHA. Thus, COAH's regulatory responsibility in this area must be acknowledged. Accordingly, we anticipate that COAH will properly discharge this responsibility by promulgating appropriate development-fee regulations.

At that point the Court determined that in the absence of such regulations, the ordinances at issue in the case had to be set aside and further agreed that the individual developers who had paid fees under the ordinances could seek refunds. Some five and a half months later Petitioner instituted this litigation seeking a refund of development fees.

The Appellate Division, in the well-reasoned *Greek* decision, *supra,* stated that "It is important to reiterate that the ordinances in question were authorized by statute, *i.e.*, the MLUL, the general police power, and the FHA. Thus, they were not *ultra vires* acts by

the municipalities. *The distinction is important."* (Emphasis added) (Petitioner's Appendix A, at 13a). The Appellate Division was careful to limit its holding to the issue of COAH's "potential power" to adopt regulations and did not pass upon the acceptability of the content of the regulations.[4] It also set forth in substantial detail the means by which legislation which was improperly enacted, but is not unconstitutional or *ultra vires,* can be ratified or cured (Petitioner's Appendix A, pp. 13a-15a). In a challenge to the retroactive application of a statute or regulation, a critical question is how the challenger's conduct, or the conduct of others in its class, would have differed if the rule in issue had applied from the start. *Daughters of Miriam Center For The Aged v. Mathews,* 590 F.2d 1250, 1262 (3rd Cir. 1978), *citing to Usery v. Turner Elkhorn Mining Co., supra.*

> Retroactive measures — whether promulgated by a legislature or by an administrative agency — have traditionally been subjected to stricter scrutiny than have prospective measures. Thus, . . . the validity of a prospective regulation by an administrative agency "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " [*Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973)] In contrast, "courts have generally compared the public interest in the retroactive rule with the private interests that are overturned by it" in deciding whether to uphold a retroactive promulgation. [*Adams Nursing Home of Williamstown, Inc. v. Mathews,* 548 F.2d 1077 (1st Cir. 1977); *SEC v. Chenery Corp.* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)] Such

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4. As previously set forth in n.1, the content of the regulations is the subject of litigation currently pending in the Appellate Division.

> disparate treatment is justified because retroactive laws interfere with the legally-induced and settled expectations of private parties to a greater extent than do prospective enactments. Still, retroactive rules designed to cure defects in regulatory schemes . . . are often sustained because the "interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect." [Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 705-06 (1960)] *Daughters of Miriam Center For The Aged, supra,* at 1259-60.

Petitioner has made no claim whatsoever that it or anyone else would have acted differently if the ordinance had been validly adopted from the outset. Indeed, non-inclusionary developers paid the fees, developed their properties, and now want the fees back. If the Township is compelled to refund all or some of the fees before the validity of the content of the regulations and the retention of fees collected under prior ordinances is resolved in the state courts, there will be no way for the Township to recoup the funds. Land which has been developed will not generate additional development fees. If the monies are returned before a final determination as to the retroactivity of the ordinance, substantial resources which could be used to further the mandated housing goals would be lost, with no guarantee that a comparable opportunity will ever again exist for the collection of such funds. As a result, there is a strong public interest in the proper retention of those funds. Moreover, it has been acknowledged by some non-inclusionary developers who paid the fees that the costs were passed on to subsequent purchasers/tenants as a cost of business. To the extent that such is the case, there is only a limited private

interest in the return of these funds — indeed, they would be a windfall to the developers. Therefore, any action by this Court, other than denial of the writ, would be premature at this point.

Finally, Petitioner relied on *McKesson v. Division of Alcoholic Beverages, supra,* to support its claim to a due process right to a "clear and certain remedy" for alleged improperly collected development fees. In that case Florida enacted a tax scheme whereby a party had to pay his taxes in full before there could be a challenge to the tax's validity; failure to pay would result in penalties. This Court found that where a tax is declared unconstitutional, the state must provide a remedy for the erroneous or unlawful taxation. Thus *McKesson* deals with a situation where a state has collected an unconstitutional tax. In the instant matter the development fees are neither taxes nor unconstitutional. *Holmdel Builders Association, supra,* 121 N.J. at 582-585. Respondents assert that *McKesson* is inapposite here.

CONCLUSION

Where Petitioner has (1) raised an issue which is not ripe for consideration by this Court; (2) failed to raise the constitutional issue claimed in the petition at the state trial and appellate levels; (3) raised a constitutional issue as to a matter which has been developed solely through court decisions based on the State Constitution; and (4) failed to present this Court with adequate factual or legal reasons for review of the court decision below, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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